FILE COPY

Supreme Court, U. S.
FILED

NOV 23 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

PETER GREENFIELD
3230 Rainier Avenue South
Seattle, Washington 98144

DAVID ALLEN
American Civil Liberties Union
of Washington Foundation
2101 Smith Tower
Seattle, Washington 98104

BURT NEUBORNE
MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Appellant

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Questions Presented 4

Statement of the Case 4

Summary of the Argument 7

ARGUMENT:

I. Appellant's use of the American flag as an aid in the dissemination of ideas is protected by the First Amendment 8

A. The First Amendment's Protection Encompasses Visual Symbols as Well as Spoken Words 8

B. Appellant's Expression Was Presumptively Entitled to Protection 9

C. . . . and the State Has Failed to Overcome the Presumption 10

1. Preservation of the peace 11

2. Promotion of respect for the flag 14

PAGE

II. Section 9.86.020 of Washington's Revised Code is unconstitutional on its face a) because constitutionally protected activity may be swept within its ambit, b) because it fails to provide officials with adequate standards for enforcement and c) because, as construed by the Washington Supreme Court, it is so vague and imprecise as to fail to apprise the public of the scope of its proscriptions 18

A. Washington's Statute Is Overbroad Because Protected First Amendment Activity May Be Swept Within Its Ambit 18

B. Washington's Statute Fails to Afford Adequate Standards for Enforcement and Administration 20

C. Washington's Statute Fails to Afford Notice of the Scope of Its Proscription 23

D. Appellant Has Standing to Invoke the Overbreadth Doctrine 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Ashton v. Kentucky, 384 U.S. 195 (1966) 26

Bachellar v. Maryland, 397 U.S. 564 (1970) 12
Broadrick v. Oklahoma, —— U.S. ——, 37 L.Ed.2d 830 (1973) 18, 20, 26, 27
Brown v. Louisiana, 383 U.S. 131 (1966) 8, 9

PAGE

Cantwell v. Connecticut, 310 U.S. 296 (1940) 13
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 13
Coates v. Cincinnati, 402 U.S. 611 (1971) 21
Cohen v. California, 403 U.S. 15 (1971) 10, 11, 15, 19, 24
Cooper v. Aaron, 358 U.S. 1 (1958) 12
Cox v. Louisiana, 379 U.S. 536 (1965) 19, 21

Dennis v. United States, 341 U.S. 494 (1951) 25
Dunn v. Blumstein, 405 U.S. 330 (1972) 11, 24

Edwards v. South Carolina, 372 U.S. 229 (1963) 10

Farrell v. Iowa, 209 N.W.2d 103 (1973), *juris. state. filed*, 42 U.S.L.W. 3201 (No. 73-574, Sept. 27, 1973) 12

Garrison v. Louisiana, 379 U.S. 64 (1964) 25-26
Gitlow v. New York, 268 U.S. 652 (1925) 15
Goguen v. Smith, 471 F.2d 88 (1st Cir. 1972), *prob. jur. noted*, 41 U.S.L.W. 3616 (No. 72-1254, May 21, 1973) 12
Gooding v. Wilson, 405 U.S. 518 (1972) 19
Grayned v. City of Rockford, 408 U.S. 104 (1972) 9

Halter v. Nebraska, 205 U.S. 34 (1907) 15
Herndon v. Lowry, 301 U.S. 253 (1937) 18

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 10

Keyshian v. Board of Regents, 385 U.S. 589 (1967) 19
Kovacs v. Cooper, 336 U.S. 77 (1949) 8
Kunz v. New York, 340 U.S. 290 (1951) 21

PAGE

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 23
Leary v. United States, 395 U.S. 6 (1969) 12
Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344 (2d Cir. 1970), *juris. state. filed,* 39 U.S.L.W. 3438 (No. 70-1507, Mar. 24, 1971) 8-7, 10, 12, 20, 23

Mishkin v. New York, 383 U.S. 502 (1966) 25

NAACP v. Button, 371 U.S. 415 (1963) 10
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 25
Niemotko v. Maryland, 340 U.S. 268 (1951) 21

Powell v. Texas, 392 U.S. 514 (1968) 25
Plummer v. Columbus, —— U.S. ——, 42 U.S.L.W. 3222 (Oct. 16, 1973) 19

Radich v. New York, 401 U.S. 531 (1971) 12

Saia v. New York, 334 U.S. 558 (1948) 23
Scales v. United States, 367 U.S. 203 (1961) 25
Schacht v. United States, 398 U.S. 58 (1970) 15
Schneider v. State, 308 U.S. 147 (1939) 14
Shelton v. Tucker, 364 U.S. 479 (1960) 19, 24
Smith v. California, 361 U.S. 147 (1959) 23, 25
State v. Turner, 78 Wn.2d 276, 474 P.2d 91 (1970) 24
Staub v. City of Baxley, 355 U.S. 313 (1958) 21
Street v. New York, 394 U.S. 576 (1969) 7, 12, 13, 16
Stromberg v. California, 283 U.S. 359 (1931) 7, 8, 10
Sutherland v. Illinois, —— Ill. —— (1973), *juris. state. filed,* 42 U.S.L.W. 3122 (No. 73-380, Aug. 29, 1973) 12

PAGE

Terminiello v. Chicago, 377 U.S. 1 (1949) 7, 10
Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973), pet. for cert. filed 41 U.S.L.W. 3555 (No. 72-1359, Apr. 9, 1973) 12
Thornhill v. Alabama, 310 U.S. 88 (1940) 21
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 7, 8, 9, 11
Tot v. United States, 319 U.S. 463 (1943) 12

United States v. O'Brien, 391 U.S. 367 (1968) 9, 11, 15

Valentine v. Chrestensen, 316 U.S. 52 (1942) 15

Watkins v. United States, 354 U.S. 178 (1957) 25
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 7, 17
Wieman v. Updegraff, 344 U.S. 183 (1952) 25

Yates v. United States, 354 U.S. 298 (1957) 25

Constitutional Provisions:

United States Constitution
First Amendment ..... *passim*
Fourteenth Amendment 2, 4, 9

Federal Statute:

28 U.S.C. §1257(2) 2

State Statutes:

Revised Code of Washington
§9.86.010 (1919) 3
§9.86.020 (1919) 3, 4, 18, 19
§9.86.030 (1919) 24

PAGE

Other Authorities:

Kalven, *The Concept of the Public Forum*, 1965 Sup. Ct. Rev. 1, 23 9

Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29 (1973) 9

Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970) 18, 26

Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. Law Rev. 67 (1960) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1690

HAROLD OMAND SPENCE,

Appellant,

—v.—

THE STATE OF WASHINGTON,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

Opinions Below

The opinions of the Supreme Court of Washington are reported at 81 Wn.2d 788, 506 P.2d 293 (1973), and are set forth in the appendix (A. 45-79).* The opinions of the Court of Appeals are reported at 5 Wn. App. 752, 490 P.2d 1321 (1971), and are set forth in the appendix (A. 21-44).

* "A" references are to the printed Appendix herein.

Jurisdiction

The judgment of the Supreme Court of Washington was filed on January 18, 1973. Appellant's timely petition for rehearing was denied on March 13, 1973, and his notice of appeal was filed in the Supreme Court of Washington on April 10, 1973 (A. 80). This appeal was docketed on June 11, 1973, and probable jurisdiction was noted on October 9, 1973. Appellate jurisdiction is conferred by 28 U.S.C. §1257(2).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, §1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Code of Washington §9.86.010 (1919):

"Flag," etc., defined. The words flag, standard, color, ensign or shield, as used in this chapter, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

Revised Code of Washington §9.86.020 (1919):

Improper use of flag prohibited. No person shall, in any manner, for exhibition or display:

(1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; . . .

Questions Presented

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments to the Constitution of the United States, may punish Appellant for displaying an American flag with a peace symbol on it under the circumstances of this case.

2. Whether Revised Code of Washington §9.86.020 is impermissibly overbroad or vague in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

On May 10, 1970 the Appellant, Harold Omand Spence, displayed an American flag, upon which was superimposed a peace symbol constructed of removable tape, outside the window of his apartment in Seattle, Washington (A. 6; 48). The display was observed by three Seattle police officers who arrested the Appellant and seized the flag.

The Appellant was subsequently charged with improper use of the flag under Revised Code of Washington §9.86.020 (2) in a criminal complaint alleging as follows:

> He, the said Harold O. Spence, in the county of King, state of Washington, on or about the 10th day of May, 1970, willfully, unlawfully and knowingly for exhibition and display, did expose to public view a flag of the United States upon which there was then and there attached and affixed a mark, picture design or drawing, to-wit: a large black circle with connecting straight lines within.

The case was tried to a jury in the King County Superior Court.[1] The three arresting officers testified that they had observed the flag displayed from the Appellant's window with what they identified as a peace symbol on it. They entered the apartment building and were met by the Appellant who, referring to the flag, volunteered, "I didn't know there was anything wrong with it. I will take it down" (A. 6).

The Appellant testified that he had displayed the flag with a peace symbol on it, and had done so for the purpose of associating the American flag with peace in protest of the recent invasion of Cambodia and of the deaths at Kent State University. He explained that he had chosen masking tape so that the peace symbol could be removed without damage to the flag (A. 6-7).

The Appellant was found guilty after trial and given a suspended sentence of ten days in jail and a fine of seventy-five dollars plus court costs (A. 7).

The Court of Appeals reversed the conviction in a 2-1 decision which held the statute under which the Appellant was charged unconstitutionally overbroad (A. 21-44).

The Washington Supreme Court in turn reversed the decision of the Court of Appeals in a 6-1 decision. In characterizing the First Amendment issue before them, Justice Hale, writing for himself and three others, observed:

---

[1] The case was appealed to the Superior Court from a conviction in the Seattle District Court. The latter is not a court of record and the trial in Superior Court was a trial *de novo*.

> The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States . . . as a medium of communication. 81 Wn.2d at 798-99 (A. 59).

With respect to the Appellant's interest in the speech activity at issue, the majority stated:

> whatever impairment might be said to arise from this statute trenching upon the defendant's rights to speak his mind freely and communicate his personal views by sign and symbol is minimal . . . (A. 59).

And with respect to the state's interest invoked to justify restriction of Appellant's fundamental right:

> We think it beyond argument that the nation and state both have a recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment and alien markings and designs (A. 60).

The majority rejected Appellant's overbreadth challenge, holding that Appellant lacked standing to attack, on the ground of overbreadth, a statute which the court found unobjectionable as applied to him (A. 53-55). Two justices concurred in the result but took issue with the majority's treatment of the overbreadth issue on the ground that "[u]sing nonfirst amendment cases to support a first amendment issue undermines the majority rationale" (A. 63).

One justice dissented on the grounds that Appellant's activity was protected under the First Amendment, that the statute under which he was convicted was unconstitutionally overbroad on its face and that in any event a

conviction could not be upheld without proof of evil intent (A. 63).

Summary of the Argument

The activity for which Appellant was prosecuted, though it involved communication by visual symbols rather than by spoken words, was expression entitled to protection under the First Amendment. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969); *Stromberg* v. *California,* 283 U.S. 359 (1931). As expression, it was subject to restriction "only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943).

Preservation of the peace, the interest tendered by the state, is not sufficiently jeopardized by the kind of activity in which Appellant was engaged to warrant interference with his freedom of expression. Cf. *Street* v. *New York,* 394 U.S. 576 (1969). Moreover, a "heckler's veto" should not be permitted to restrict expression otherwise entitled to First Amendment protection. E.g., *Terminiello* v. *Chicago,* 377 U.S. 1 (1949). Preservation of an orthodoxy of expression reflecting "proper respect for our national emblem" is not an interest which a state may lawfully protect. *Street* v. *New York, supra; West Virginia State Board of Education* v. *Barnette, supra.*

Washington's improper flag use statute is fatally overbroad as demonstrated by its application to the facts of this case and to a myriad of other examples of unquestionably protected expression which are made punishable by its terms. The statute is so broad that it cannot be taken literally, cf. *Long Island Vietnam Moratorium Committee* v. *Cahn,* 437 F.2d 344 (2d Cir. 1970), *juris. statement filed,* 39

U.S.L.W. 3438 (No. 70-1507, March 24, 1971), and it is, therefore, vague. Its reach is unnecessarily extended by the absence of any requirement of proof of criminal intent.

ARGUMENT

I.

Appellant's use of the American flag as an aid in the dissemination of ideas is protected by the First Amendment.

A. *The First Amendment's Protection Encompasses Visual Symbols as Well as Spoken Words.*

The First Amendment's protection extends beyond spoken words, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Stromberg* v. *California*, 283 U.S. 359 (1931), and the fact that visual symbols (such as words, gestures or flags) rather than audible language are one's medium of expression is not of itself constitutionally significant. It is when some component of the medium "sufficiently impinges on some valid state interest" (*Tinker, supra* at 515 [White, J., concurring]) that the boundaries of protected speech are encountered. And, of course, such boundaries exist for the spoken word as well as for the visual display. *E.g., Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (overamplified loudspeakers).

In reviewing attempts to regulate expression in its various forms, this Court has considered the medium of expression at issue in each instance in light of the environment in which it was used. It has not infrequently found that, under the relevant circumstances, visual communication was pro-

tected where audible expression could have been proscribed, *e.g., Tinker, supra* (black armbands in a public school); *Brown* v. *Louisiana, supra* (silent vigil in a public library), or that spoken words were properly punished where silent expression might have been immune, *e.g., Grayned* v. *City of Rockford,* 408 U.S. 104 (1972) (noise near a public school). This is not to suggest that so-called "symbolic speech" is, as a general rule, afforded more (or less) protection than so-called "pure speech."[2] It is, rather, to suggest that any medium of expression must be considered in light of the circumstances in which it is employed. Whenever a state seeks to regulate expression it is necessary to identify precisely the nature of the state's interest in regulation and to determine whether such interest is "unrelated to the suppression of free expression"; whether such interest is "sufficiently important" to justify the curtailment of free expression; and whether the proposed curtailment is "no greater than is essential to the furtherance of that interest". *United States* v. *O'Brien,* 391 U.S. 367, 376, 377 (1968). *See generally,* Nimmer, *The Meaning of Symbolic Speech under the First Amendment,* 21 U.C.L.A. L. Rev. 29 (1973).

B. *Appellant's Expression Was Presumptively Entitled to Protection . . .*

Appellant's display of an American flag with a peace symbol on it in May of 1970 expressed a protest of the invasion of Cambodia and the deaths at Kent State University (A. 6). This instance of expression was presumptively

[2] Alluding, in a slightly different context, to the category of "pure speech," Professor Kalven has observed that "all speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter." *The Concept of the Public Forum,* 1965 Sup. Ct. Rev. 1, 23.

entitled to protection under the First and Fourteenth Amendments, for it is "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen* v. *California*, 403 U.S. 15, 24 (1971), and "the State has a heavy burden to demonstrate that [the proscription under review] presents . . . an exceptional case," *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504 (1952). Appellant submits that his is no exceptional case. On the contrary, his quiet expression of an aspiration for peace constituted an exercise of the freedom of speech in its "most pristine and classic form."[3] *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *Stromberg* v. *California*, *supra*. Furthermore, his medium was one which has been hallowed by tradition: use of the flag with slogans or with portraits of political candidates superimposed on it has for generations been part of our culture. Referring to such uses of the flag, Chief Judge Lumbard concluded:

> The use of the American flag throughout our history and in almost every political campaign as an aid in the dissemination of ideas demonstrates beyond any doubt the protected nature of such forms of expression. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2nd Cir. 1970), *juris. statement filed*, 39 U.S.L.W. 3438 (No. 70-1507, March 24, 1971).

C. . . . *and the State Has Failed to Overcome the Presumption.*

While "only a compelling state interest . . . can justify limiting First Amendment freedoms," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), Appellant submits that Washington's punishment of his peaceful speech activity is not only

---

[3] This is not to imply that his message was necessarily soothing or uncontroversial. E.g., *Terminiello* v. *Chicago*, 377 U.S. 1 (1949).

unnecessary to the promotion of a compelling state interest, it cannot be justified by reference to any legitimate governmental interest whatsoever—that is, by reference to any interest "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). Since the state has the burden of demonstrating the contrary, it is appropriate to look first to the interest which it has tendered.[4]

1. Preservation of the peace

In its brief below (at p. 9) the state commented without elaboration:

> The legitimate state interest is, of course, preservation of the peace.

While preservation of the peace is, clearly, a legitimate state concern, that concern can never justify curtailment of expression which poses no threat to the peace. *Cohen* v. *California, supra* at 20. There is nothing in the record of this case to suggest that a disturbance was likely. On the contrary, the quiet, unobtrusive display from Mr. Spence's window was observed only, so far as the record discloses, by three policemen, and there is no indication that they were in any way disconcerted. We have only the state's "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of speech." *Tinker, supra* at 508.

The state apparently views the statute under which Appellant was prosecuted as creating a conclusive presump-

[4] In reviewing state regulation restricting fundamental rights, the Court may limit its examination to interests tendered by the state. See, e.g., *Dunn* v. *Blumstein*, 405 U.S. 330 (1972).

tion that the display of a flag with a peace symbol (or other marking) poses an imminent threat to the peace regardless of the context.[8] In effect, it would establish a heckler's veto without the need for a heckler. But this Court has rejected the notion of a heckler's veto. *See, e.g., Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

---

[8] Even where the curtailment of expression is not at issue, a criminal statutory presumption must fall unless it can be said with assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. *Leary* v. *United States*, 395 U.S. 6, 32-36 (1969); *Tot* v. *United States*, 319 U.S. 463 (1943). Appellant suspects that the likelihood of a breach of the peace resulting from the display of a flag with a peace symbol on it from the window of an apartment in Seattle, Washington approaches zero. Consider how many of the recently reported cases dealing with "improper" use or even desecration of the flag actually involved some breach of the peace—there are none so far as Appellant is aware.

A review of the flag cases currently pending before this Court reveals that none involve a danger of an actual breach of the peace. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2nd Cir. 1970), juris. statement filed, 39 U.S.L.W. 3438 (No. 70-1507, March 24, 1971) (Peace symbol on flag—no evidence of breach of peace); *Goguen* v. *Smith*, 471 F.2d 88 (1st Cir. 1972), prob. jur. noted, 41 U.S.L.W. 3616 (No. 72-1254, May 21, 1973) (flag patch on buttocks—no evidence of breach of peace); *Thoms* v. *Heffernan*, 473 F.2d 478 (2nd Cir. 1973), pet. for cert. filed, 41 U.S.L.W. 3555 (No. 72-1359, April 9, 1973) (peace symbol on flag—no evidence of breach of peace); *Sutherland* v. *Illinois*, —— Ill. —— (1973), juris. statement filed, 42 U.S.L.W. 3122 (No. 73-380, Aug. 29, 1973) (flag burning—no evidence of breach of peace); *Farrell* v. *Iowa*, 209 N.W.2d 103 (1973); juris. statement filed, 42 U.S.L.W. 3201 (No. 73-574, Sept. 27, 1973) (flag burning—no evidence of breach of peace). Moreover, the flag cases which have been decided by this Court reveal no danger of a breach of the peace. E.g., *Street* v. *New York*, 394 U.S. 576 (1969) (flag burning—no evidence of breach of peace); *Radich* v. *New York*, 401 U.S. 531 (1971) (obscene use of flag—no evidence of breach of peace). Indeed, in the numerous instances in which flag statutes have been invoked to punish expression, counsel are aware of no case in which actual evidence of a danger of a breach of the peace has been adduced.

In *Street* v. *New York*, 394 U.S. 576 (1969), Mr. Justice Harlan enumerated four interests which under the circumstances of that case did *not* justify the prohibition of speech critical or even contemptuous of the flag:

> (1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passersby who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem. *Id.* at 591.

Yet, despite the fact that the facts of the instant case are even milder than *Street* these are the very interests to which the state alludes in defense of its curtailment of Appellant's freedom of expression.*

Referring to the quoted passage from *Street*, Judge Horowitz, writing for the Washington Court of Appeals in this case observed:

> If such interests are insufficient with respect to *words* . . . critical or contemptuous of the flag, they would clearly be insufficient as to *symbols* used conveying the

---

* Appellant's expression can hardly be compared to the "fighting words" at issue in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Appellant's message was not "directed to the person of [any] hearer." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940). No individual actually present could reasonably have regarded Appellant's display as a direct personal insult.

> same meaning as the words themselves; and a fortiori they would be insufficient as to symbols respectful of the flag and involving no physical destruction of any part thereof, the flag in conjunction with the peace symbol being used to passively communicate a constitutionally protected message. 5 Wn. App. at 761 (A. 33).

Washington's curtailment of Appellant's freedom of expression cannot be justified, given the facts of this case, by reference to the state's interest in preserving the peace.

2. Promotion of respect for the flag

Significantly, the Washington Supreme Court did not even mention "preservation of the peace" as a basis for sustaining the curtailment of Appellant's activity. It did, however, find a

> recognizable interest in preserving the flag as a symbol of the nation and in keeping it free of extraneous adornment .... 81 Wn. 2d at 799 (A. 60).

In explaining its conclusion, the court below offered three observations: (1) Appellant might express his views by other means; (2) if Appellant's expression were protected, then there could be no restriction of use of the flag for commercial advertising purposes; and (3) if Appellant's expression were protected, then the flag could be used to communicate obnoxious political, social, religious and philosophical ideas. *Ibid.*

The "other means available" rationale was rejected by this Court in *Schneider* v. *State*, 308 U.S. 147, 163 (1939):

> one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

See also, *Cohen* v. *California*, 403 U.S. 15 (1971).

The concern over commercial exploitation of the flag presupposes that the boundaries of protected expression for commercial advertising purposes are coextensive with those of protected political speech, a view which this Court has not taken. *See, e.g., Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).[7]

And finally, the court's concern that the flag might be used to convey various obnoxious "political, social, religious and philosophical ideas" (81 Wn.2d at 800 (A. 60)) and its reasoning that, consequently, the flag may not be used "as a medium of communication" (81 Wn.2d at 799 (A. 59)) points plainly to a content-oriented regulation of expression at odds with the First Amendment. Cf. *Schacht* v. *United States*, 398 U.S. 58, 63 (1970). The court below was clearly contemplating regulation *not* "unrelated to the suppression of free expression" (*United States* v. *O'Brien*, 391 U.S. 367, 377 [1968]) when it observed:

> If defendant cannot be constitutionally barred from affixing and displaying what he describes as a peace symbol upon the flag of the United States, neither can he be constitutionally prevented from proclaiming the Ku-Klux Klan upon it, nor the swastika, nor the ham-

[7] This Court upheld a restriction on commercial use of the flag in *Halter* v. *Nebraska*, 205 U.S. 34 (1907). However, no First Amendment issues were considered since it was not until 1925 that the First Amendment was held applicable to the states in *Gitlow* v. *New York*, 268 U.S. 652 (1925).

> mer and sickle, either in advocacy of the Ku-Klux Klan, or Nazism, or Communism, or in opposition to these movements.[8] 81 Wn.2d at 800 (A. 60-61).

Appellant recognizes that freedom of speech may entail exposure from time to time to distasteful ideas or ideologies. However, as Mr. Justice Harlan stated in *Street* v. *New York*, 394 U.S. 576, 592 (1969):

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.[9]

Nor may expression be curtailed for the purpose of requiring citizens to show "proper respect for our national emblem." *Id.* at 591.

Our flag, though we may cherish it, is after all only a symbol (or to those uninitiated in the language, a piece of

---

[8] The concern implicit in this observation is manifestly futile since, as the court acknowledges, "the statute does not bar the carrying of the American flag in connection with other banners, flags, signs, symbols or devices" (81 Wn.2d at 799 [A. 59]) so long as the symbols are not actually combined. Is it less distressing to conceive of the American flag and a swastika-imprinted banner flying side by side than to conceive of the symbols combined?

[9] This proposition and Appellant's conviction in this case cannot be reconciled. Appellant's plight was well characterized by Justice Finley, dissenting in the Washington Supreme Court, as follows:

> The young man's action in displaying the flag adorned with the peace symbol . . . might be regarded as an example of an idealistic and courageous appeal for world peace. However, he has apparently offended the sensitivities of certain more sedate citizens. 81 Wn.2d at 802-3 (A. 64).

many-colored cloth).[10] To force Appellant to render ritualistic obeisance to it by requiring him to observe a series of taboos concerning its use or display is to raise it to the secular equivalent of a religious icon in violation of the First Amendment. *Cf. West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), where enforcement of a compulsory flag salute rule was rejected on First Amendment grounds and in which Mr. Justice Jackson observed:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion. . . . *Id.* at 642.

Suppression of obnoxious ideas, even where their expression involves use of the American flag, is not a legitimate interest of a government limited by the First Amendment.

---

[10] It is a disquieting paradox that the flag which to so many symbolizes a mature tradition of freedom of speech should itself be unavailable for uninhibited use as a "medium of communication." 81 Wn.2d at 799 (A. 59).

II.

Section 9.86.020 of Washington's Revised Code is unconstitutional on its face a) because constitutionally protected activity may be swept within its ambit, b) because it fails to provide officials with adequate standards for enforcement and c) because, as construed by the Washington Supreme Court, it is so vague and imprecise as to fail to apprise the public of the scope of its proscriptions.

Even if one assumes that Washington may constitutionally impose some degree of regulation upon the use and display of the American flag, this Court has required that provisions impinging upon areas protected by the First Amendment must be drawn with sufficient narrowness and precision to insure that First Amendment freedoms retain the "breathing space" necessary for robust survival. E.g. Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. of Pa. Law Rev. 67 (1960); *Broadrick* v. *Oklahoma,* —— U.S. ——, 37 L. Ed.2d 830 (1973).

A. *Washington's Statute Is Overbroad Because Protected First Amendment Activity May Be Swept Within Its Ambit.*

This Court has ruled that a statute which purports to outlaw protected First Amendment activity is unconstitutional on its face, despite the fact that the statute may also purport to proscribe activity not entitled to First Amendment protection. E.g., *Broadrick* v. *Oklahoma, supra; Herndon* v. *Lowry,* 301 U.S. 253, 258 (1937); *Shelton*

v. *Tucker*, 364 U.S. 479 (1960); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Keyshian* v. *Board of Regents*, 385 U.S. 589 (1967); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Plummer* v. *Columbus*, —— U.S. ——, 42 U.S.L.W. 3222 (Oct. 16, 1973).

In *Broadrick*, Mr. Justice White articulated the rationale underlying the First Amendment overbreadth doctrine when he stated:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.
>
> • • • • •
>
> Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." 37 L. Ed.2d at 839-840.

Thus, whether or not Appellant's innocuous expression is entitled to First Amendment protection,[11] Washington's statute cannot survive constitutional scrutiny if its proscriptions are so broadly drawn as to justify a "judicial prediction or assumption" that third persons will refrain from protected activity as a consequence of Section 9.86.020 of Washington's Revised Code.

---

[11] Appellant, of course, vigorously asserts that his expression is protected by the First Amendment. See *infra*, pp. 8-17.

The Washington statute, as it has been broadly construed by Washington's Supreme Court, purports to outlaw the traditional use of the American flag as an effective aid in the dissemination of ideas. In ruling the virtually identical New York statute unconstitutionally overbroad, [then] Chief Judge Lumbard stated:

> "The use of the American flag throughout our history and in almost every political campaign as an aid in the dissemination of ideas demonstrates beyond doubt the protected nature of such forms of expression. *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F.2d 344 (2d Cir. 1970), juris. statement filed, 39 U.S. L.W. 3438 (No. 70-1507, March 24, 1971).

Since no state may purport to outlaw the time-honored practice of invoking the flag in a manner similar to that described by Judge Lumbard, Washington's statute, unless invalidated, will impose a pervasive and continuous restraint on First Amendment activity and is, therefore, unconstitutionally overbroad.

B. *Washington's Statute Fails to Afford Adequate Standards for Enforcement and Administration*

As Mr. Justice White noted in *Broadrick*, a second policy underlying the First Amendment overbreadth doctrine is a concern that no penal statute, especially in the First Amendment area, may vest a local functionary with "standardless" discretion to determine whether or not a given form of expression falls within its proscription. It is, of course, a truism to observe that any such overbroad statute is a licensing provision, permitting only that expression tolerated by local officials to flourish.

In *Cox* v. *Louisiana*, 379 U.S. 536 (1965), this Court, in declaring a broadly worded breach of the peace statute unconstitutional, stated:

> [t]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. 379 U.S. at 557.

In *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), a broad anti-picketing ordinance was invalidated because:

> The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. 310 U.S. at 97-98.

See also, *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Coates* v. *Cincinnati*, 402 U.S. 611 (1971).

The recent history of the nation's flag statutes bear witness both to the wisdom of the *Cox-Thornhill-Coates* rule and to the capacity for abuse inherent in Washington's overbroad statute.

Despite the public and notorious commercial exploitation of the flag, counsel are aware of no recent attempt to invoke statutes similar to Washington's against any commercial exploiter.

Despite the widespread use of the American flag by groups supporting recent American policy in Southeast Asia, counsel are aware of no attempts to invoke flag laws against such groups.

Despite the systematic use of American flags in connection with election campaigns, counsel are aware of no attempt to invoke flag laws against any candidate.

In fact, the only persons against whom flag laws similar to Washington's have been invoked, have been persons who have earned the enmity of local functionaries by espousing dissenting political opinions or adopting non-conformist modes of dress.

The fact is that flag laws such as Washington's, because of their overbreadth and lack of precision, have been utilized by local officials as general warrants to punish dissenting or non-conforming behavior.[12]

---

[12] A representative samplying of prosecutions brought under New York's identical statute prior to its demise in *Long Island Vietnam Moratorium Committee, supra*, exposes the capacity for abuse inherent in Washington's statute:

1) In Claverack, New York, a young man was arrested for driving a red, white and blue Volkswagen (he also had a brown beard). *People* v. *Pregaskis*, currently pending before the Justice of the Peace of Claverack, New York.

2) In Happauge, New York, a young housewife was arrested and held on $500 bond for flying her American flag upside down outside her home to protest the war in Vietnam. *People* v. *Hubner* (Nassau District Court).

3) In New York City, approximately sixty persons have been arrested for displaying a peace symbol on a flag on their automobile windows.

4) In *People* v. *Place, et al.*, four actors associated with the Yale Drama School were arrested in New York City for using the flag as a theatrical prop in a play critical of contemporary Ameri-

C. Washington's Statute Fails to Afford Notice of the Scope of Its Proscription

In attempting to construe the virtually identical New York statute, Chief Judge Lumbard found the statutory language so broad that it could not be read literally, leaving its meaning unascertainable. *Long Island Vietnam Moratorium Committee* v. *Cahn, supra,* at 350. The net result of such a statute is to force persons wishing to engage in protected activity to gamble that their reading of the statute will be in accord with the reading of the local police. This Court, however, has consistently invalidated penal statutes which inadequately apprise the public of the scope of their proscription. E.g. *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939).

The uncertainty inherent in the Washington statute is particularly disturbing because, when rights under the First Amendment are at issue, this Court has demanded precise delineation of the duties of a citizen. E.g. *Smith* v. *California,* 361 U.S. 147 (1959); *Saia* v. *New York,* 334 U.S. 558 (1948).

The reach of Washington's improper flag use statute is further broadened by virtue of the fact that, as construed by the Washington Supreme Court, it "requires no proof of evil or criminal intent or design . . . ." 81 Wn.2d at 793 (A. 52). This means that the statute gratuitously punishes conduct which reflects no disrespect for the flag (as-

---

ean values. The charges were ultimately dismissed on motion of the District Attorney.

5) In *People* v. *Leyva,* a New York bookseller was arrested for selling a poster headed "Because We Care!," signed by luminaries of the anti-war movement, consisting of an American flag in which the stars were replaced by peace symbols.

suming that the statute is designed to punish such disrespect);[13] it means also that the statute punishes activity engaged in without knowledge of any circumstances which would tend to create a public disorder (assuming that the statute is designed to guarantee preservation of the peace).[14] This approach to either legislative objective flies in the face of this Court's mandate that legislation restricting presumptively protected activity be narrowly drawn:

> Statutes affecting constitutional rights must be drawn with "precision," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *United States* v. *Robel*, 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives. *Shapiro* v. *Thompson*, [394 U.S. 618, 631 (1969)]. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less restrictive means." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972).

---

[13] By contrast, under Washington's flag desecration statute, Revised Code of Washington §9.86.030, "intent to desecrate . . . must be established." *State* v. *Spence*, *supra* at 792 (A. 52). See *State* v. *Turner*, 78 Wn.2d 276, 474 P.2d 91 (1970).

[14] The nature and extent of this Court's emphasis on intentionality in relation to anti-breach-of-the-peace regulations impinging on presumptively protected activity is illustrated by the language of Mr. Justice Harlan in *Cohen* v. *California*:

> we [do not] have here an instance of the exercise of the State's police power to prevent a speaker from *intentionally* provoking a given group to hostile reaction. [Citations omitted.] There is . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant *intended* such a result. 403 U.S. at 20. [Emphasis supplied.]

One less restrictive approach to the regulation of flag use would be a statute incorporating a well-defined element of criminal intent.

A requirement of *mens rea* is the rule, rather than the exception, in criminal law. See *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Dennis* v. *United States*, 341 U.S. 494, 500 (1951). And while this Court has not articulated a general doctrine regarding *mens rea*, see *Powell* v. *Texas*, 392 U.S. 514, 535 (1968), it has relied heavily on notions of intentionality and malice in narrowing the regulation of presumptively protected activity. For example, in *Scales* v. *United States*, 367 U.S. 203 (1961), the Court ruled that in order to convict an individual under the membership clause of the Smith Act, a showing of active participation in the organization with knowledge of, and specific intent to bring about, its illegal objectives was necessary. See also *Yates* v. *United States*, 354 U.S. 298 (1957); *Dennis* v. *United States*, *supra*; *Watkins* v. *United States*, 354 U.S. 178 (1957); cf. *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

In *Smith* v. *California*, *supra*, this Court invalidated an ordinance which would have imposed criminal liabilty on a bookseller for possession or sale of obscene material without requiring proof of his knowledge of the *contents* of the materials. See also *Mishkin* v. *New York*, 383 U.S. 502 (1966).

Similarly, the imposition of civil sanctions for a defamatory attack on a public official has been constitutionally limited by requiring proof of "actual malice," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964), and a similar rule has been used to narrow statutes imposing criminal sanctions for libelous remarks. See *Garrison* v.

Louisiana, 379 U.S. 64 (1964); cf. *Ashton* v. *Kentucky*, 384 U.S. 195 (1966) (common law of criminal libel). See generally *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 882-91 (1970).

If the state of Washington has a legitimate concern in regard to use of the American flag, any such concern could be adequately addressed by a narrowly drawn statute which employed a well-defined element of criminal intent as a limiting principle.

D. *Appellant Has Standing to Invoke the Overbreadth Doctrine*

In refusing to declare Washington's flag statute unconstitutionally overbroad, a majority of the Washington Supreme Court erroneously ruled that Appellant lacked standing to argue overbreadth, since Washington's statute was constitutional as applied to his communicative activity [A. 53-55].[15] However, as this Court noted in *Broadrick*, the very essence of the First Amendment overbreadth doctrine is a relaxation of traditional standing rules to permit the invalidation of a statute which acts as a restraint upon protected expression. Since the circumstances warrant a "judicial prediction or assumption" that Washington's statute will "cause others not before the Court to refrain from constitutionally protected speech or expression," appellant unquestionably possesses standing to urge that the statute be declared invalid on its face.[16]

---

[15] Of course, appellant vigorously denies that his communication could be constitutionally proscribed. See, *infra*, pp. 8-17.

[16] Appellant assumes that the articulation in *Broadrick* of a "substantial" overbreadth requirement in certain situations was designed merely to allow the Court to make discerning "judicial

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

PETER GREENFIELD
3230 Rainier Avenue South
Seattle, Washington 98144

DAVID ALLEN
American Civil Liberties Union
of Washington Foundation
2101 Smith Tower
Seattle, Washington 98104

BURT NEUBORNE
MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Appellant

November 23, 1973

---

prediction" as to the danger which a particular statute poses to the robust exercise of protected speech. *Broadrick* v. *Oklahoma*, *supra*, 37 L.Ed.2d at 842, n. 14. Where, as here, the impact of Washington's statute on protected expression is obvious and pervasive, whether or not one phrases the test as overbreadth or substantial overbreadth, it is clearly satisfied.